ceptions Signed June 7th Is Too Late.—Where the final judgment of conviction was entered on April 8th, a bill of exceptions signed June 7th was signed on the sixty-first day and was too late.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 387.]

Error to Circuit Court, York County.

Henry James was convicted of entering in the nighttime, without breaking, the dwelling of another, with intent to commit rape, and he brings error. Writ of error dismissed.

F. S. Collier and *C. V. Spratley,* both of Hampton, and *J. T. Newsome,* of Newport News, for plaintiff in error.

John R. Saunders, Atty. Gen., for the Commonwealth.

PORTNER et al. *v.* PORTNER'S EX'RS et al.

June 15, 1922.

[112 S. E. 762.]

1. Wills (§ 303 (1)*)—Evidence of Attesting Witnesses Held to Show Due Execution of the Will.—Where the will was in due form and was attested by three competent witnesses, one more than the statute requires, and two of the witnesses testified that the will was both signed and acknowledged by the testator in the presence of all three of them, and the other testified it was not signed in his presence, but that he did attest the signature, the evidence clearly preponderated to prove the due execution and acknowledgement of the will, if it did not overwhelmingly prove it, and sustained a verdict finding due exceution.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 744.]

2. Wills (§ 55 (5)*)—Evidence of Illness Held Not to Show Mental Incapacity.—Evidence that, prior to the execution of the will, testator had been drinking heavily, and was not only suffering from the effects thereof, but was sick in a hospital when the will was made, but leaving small room to doubt that, when he signed and acknowledged the will, he fully understood what he was doing, is sufficient to sustain a verdict finding he was competent to make a will.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 713.]

3. Wills (§ 166 (1)*)—Evidence Held to Sustain Verdict Finding There Was No Undue Influence.—Where the only direct evidence of undue influence was testimony the beneficiary had declared she had seen to it that testator made a will, which was denied by the beneficiary, and the decided weight of the testimony showed that neither the beneficiary nor her husband knew of the will until after its execution, and the evidence showed sufficient reason for testator disposing of

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

his property as he did, the verdict finding against undue influence is sustained by the evidence.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 393.]

4. Appeal and Error (§ 1058 (4)*)—Exclusion of Evidence Held to Have Been Cured by Subsequent Permission to Introduce It.—Error, if any, in excluding, in proceedings to contest a will, evidence that the bulk of testator's property was received from his father, and that he had agreed with his brothers none of them should make a will, which was offered to show the improbability of testator violating the agreement, was not prejudicial, where, after some rulings excluding such evidence had been made, counsel for contestants withdrew their objections to such evidence, and contestants had the opportunity to get it before the jury.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 595.]

5. Witnesses (§ 338*)—Evidence of Character of Witness Held Admissible to Show Improbability Testator Requested Her Protection against Undue Influence.—Where a witness for contestants had testified that testator requested her to remain with him, because his sister was coming and she had been urging him to make a will, evidence that the witness was of immoral character was admissible to show the improbability that testator, who was otherwise shown to have treated his sister with the utmost respect, would have made such a request of the witness, though the witness could be impeached only by proof of her general reputation for truth and veracity.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 970.]

6. Trial (§ 75*)—Objection to Admission of Evidence Is Waived by Permitting Subsequent Testimony to Same Effect without Objection.—An objection to evidence that a witness for the objector was of immoral character was waived, where the objector thereafter permitted another witness to testify to the same effect without objection.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 348.]

7. Wills (§ 384*)—Certificate Complaining of Exclusion of Evidence Held Not to Show Reversible Error.—An assignment of error that the court refused to permit contestants of a will to prove that the whole estate left by testator, except a small equity, was derived from his father's will, cannot be sustained, where the certificate presenting the question shows that the witness had already stated, in answer to a question whether testator had received any estate except that which he got from his father's will, that he had a small equity in a house and lot, and the questions which he was not permitted to answer were how he got that and what was its value.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 604.]

8. Appeal and Error (§ 971 (5)*)—Witnesses (§ 240 (2)*)—Permitting Leading Questions Is within Trial Court's Discretion.—The matter of allowing leading questions rests very largely in the discretion

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of the trial court, and the Supreme Court of Appeals will rarely interfere with the action of the lower court on that ground.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 597.]

9. Witnesses (§ 240 (5)*)—Permitting Leading Question as to Fact Concerning Which Witness Had Previously Testified Is Not Error.—It was not error for the trial court to permit an attesting witness to a will to answer the leading question as to whether the facts stated in the attesting clause were true, where the witness had already testified as to the circumstances under which the will was signed and attested, and her testimony confirmed the statement in the attesting clause.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 594.]

10. Wills (§ 165 (2)*)—Declaration of Intent, Interwoven with Statement of Affection for Beneficiary, Is Admissible.—In proceedings to contest a will, testimony as to a declaration by testator that he was going to leave everything to his sweetheart, and that the sister, whom he made beneficiary under his will, was the only sweetheart he had, was admissible, without regard to its remoteness from the time of the execution of the will, since the declaration as to the intention was so interwoven with his expression of affection for his sister as to make it proper evidence.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 776.]

11. Wills (§ 165 (2)*)—Remoteness of Time Does Not Affect Competency of Declaration of Affection for Beneficiary.—The remoteness of a time of declaration made by testator from the time of the execution of the will would affect the weight of such declaration, but not its competency as evidence of his regard for his sister, whom he made beneficiary under the will.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 776.]

12. Wills (§ 165 (5)*)—Previous Declaration of Intention Carried Out in Will Is Admissible to Rebut Undue Influence.—Where the will is attacked on the ground of undue influence, a declaration by testator, made some time before the execution of the will, that he intended to give his property to the sister whom he made beneficiary under his will, was admissible as tending to show that nothing which occurred about the time the will was made had operated to change his attitude.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 776.]

13. Appeal and Error (§ 699 (4)*)—Failure to Certify Instructions Given Prevents Review of Those Refused.—Where the certificate to the bill of exceptions, which purported to embrace those instructions offered by plaintiff in error and refused, erroneously stated the instructions therein were the instructions granted, and did not set forth the instructions which were in fact given, the omission of the instructions given, though evidently an oversight, is a legal obstacle to the consideration of the instructions refused, so that assignment of error

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

in the refusal of the instructions cannot be considered, even if the mistake in the certificate be disregarded.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 379.]

14. Exceptions, Bill of (§ 50*)—Judge Must Be Given Reasonable Time to Examine Proposed Bill.—While the trial judge must give prompt diligence and faithful attention to exceptions tendered within the time prescribed, and, if reasonable, properly sign them within that time, he cannot be required to act blindly, and sign exceptions which he has had no fair opportunity to examine, if such a course be necessary to allow his signature within the statutory period, and counsel must allow the judge so much of the statutory period of 60 days after final judgment within which the bill must be signed as is necessary under the circumstances to enable the judge to examine, correct, if necessary, and sign the exceptions.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 392.]

15. Time (§ 9 (7)*)—Bill of Exceptions Must Be Signed by October 4, after Final Judgment on August 5.—Where the final judgment was rendered on August 5, the last day on which the bill of exceptions could be signed by the trial judge under the statute was October 4.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 387.]

16. Appeal and Error (§§ 691, 695 (1), 701 (3)*)—Consideration of All Evidence Is Essential to Review of Assignments as to Its Sufficiency and Admissibility and as to the Instructions.—A consideration of all the evidence introduced at the trial is essential to an examination of questions relating to the sufficiency of evidence, to its admissibility, and to the giving and refusal of instructions.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 386.]

17. Appeal and Error (§ 670 (2)*)—Certificate of Trial Court Is Final, Notwithstanding Contradiction by Attorney's Affidavit.—The Supreme Court of Appeals cannot, on writ of error, decide a disputed question of fact between court and counsel as to when the certificate for bill of exceptions containing all the evidence was presented to the court for signature, but must accept the certificate of the trial court as final, notwithstanding an affidavit of counsel to the contrary.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 609.]

18. Appeal and Error (§ 663 (2)*)—Certificate that Bill Was Not Presented in Time Deprives Court of Jurisdiction to Consider It.—A certificate by the judge of the trial court, showing that the bill of exceptions containing all the evidence was not presented to him within the time required by statute, leaves the Supreme Court of Appeals wholly without jurisdiction to consider the exceptions signed thereafter, and where all the other exceptions were necessarily dependent for their materiality on a consideration of the evidence, the writ of error must be dismissed.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 387.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court of Prince William County.

Proceeding to contest a will by A. O. Portner and others against the executors of Paul V. Portner and others. From a judgment admitting the will to probate, contestants bring error. Writ of error dismissed.

I. L. Costigan, of Washington, D. C., *John L. Lee,* of Lynchburg, *Thos. H. Lion,* of Manassas, and *R. E. Byrd,* of Richmond, for plaintiffs in error.

H. T. Davies, of Manassas, *Eppa Hunton, Jr.,* of Richmond, and *John S Barbour,* of Fairfax, for defendants in error.

THRIFT *v.* COMMONWEALTH.

June 15, 1922.

[112 S. E. 770.]

1. Time (§ 9 (7)*)—Date of Final Judgment Is Counted in the 60 Days within Which Bill of Exceptions Must Be Filed.—The date on which the final judgment in a criminal case was rendered is to be counted as one of the 60 days within which the bill of exceptions must be filed, as prescribed by Code 1919, § 6252, so that a bill of exceptions signed on December 30, where the final judgment was pronounced on October 31, was signed on the sixty-first day.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 387.]

2. Criminal Law (§ 1092 (7)*)—Trial Judge Is without Jurisdiction to Sign Bill of Exceptions after 60 Days Have Expired.—The trial judge was without jurisdiction to sign a bill of exceptions after the expiration of the 60 days after the final judgment of conviction for a crime.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 392.]

Error to Circuit Court, Arlington County.

Clifton Thrift was convicted of a violation of the liquor law, and he brings error. Writ of error dismissed.

T. Morris Wampler, of Washington, D. C., for plaintiff in error.

John R. Saunders, Atty. Gen., for the Commonwealth.

SORROS *v.* COMMONWEALTH.

June 15, 1922.

[112 S. E. 771.]

1. Criminal Law (§ 1092 (7)*)—Bills of Exceptions, Not Signed within Time Required, are Not Part of the Record.—Bills of exceptions, which were not signed within 60 days after the judgment of

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.